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Kalaivanan a/l Sundarajoo & Anor v Poo Cheng Hock

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HIGH COURT (PENANG) — CIVIL APPEAL NO PA-12B-16–03 OF 2016
LIM CHONG FONG JC
12 OCTOBER 2016

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Damages (Personal Injury or Death) — Road accident — Appeal against award made — Whether damages awarded sufficient — Whether fat embolism suffered by first plaintiff should be separately awarded — Whether second plaintiff could claim for loss of marriage prospects

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This was an appeal on the quantum awarded in a road accident case where the first appellant was riding his motorcycle with the second appellant riding pillion along Jalan Taman Mesra, Mak Mandin, Seberang Perai. At the three-way road junction, the respondent whilst driving his motorcar without halting at the junction, collided onto the right side of the motorcycle. At the trial, it was agreed by all parties that liability is to be apportioned at the ratio of 25% and 75% respectively. The first appellant was awarded general damages of RM36,000 and special damages of RM1,621 with interests and costs. The second appellant was awarded damages of RM91,800, special damages of RM16,739, future costs of surgery of RM10,000 and accordingly future pain and suffering of RM5,000 together with interest and costs. The first appellant's challenge on the quantum was for pain and suffering and loss of amenities due to closed comminuted fracture at the mid shaft of his right femur and resultant fat embolism and for loss of earnings. The second appellant's challenge on the quantum was under the head of pain and suffering and loss of amenities due to right femur fracture with 4 cm shortening and loss of marriage prospects.

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Held, allowing the appeal partially:

(1) Although the fat embolism emanated from the fractured femur, they were different and distinct injuries whereby the first appellant likely endured concurrent and consecutive pain and suffering initially from the fracture and embolism and later pain and suffering from the embolism only. Therefore, the court awarded a separate award of RM15,000 for fat embolism syndrome and RM30,000 for the fractured femur. There should be a discount of 10% for overlapping on the overall award under this head. As for loss of earnings, there was no appealable error that warranted appellate intervention (see paras 21–23).

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(2) The second appellant had not met the 'good gracious' test as laid out in *Watson v Powles* [1967] 3 All ER 721 in order to justify appellate

intervention for the award to RM50,000 for pain and suffering and loss of amenity arising from the fracture of the right femur. The award by the sessions court judge was within the range of past awards for similar injuries (see paras 24–25).

(3) The claim of loss of prospect of marriage by the second appellant was speculative. The second appellant was only 14 years old at the time of the accident and there was no proof of a marriage proposal that was already made to her and withdrawn consequent to the road accident. Further, she did not suffer any facial disfigurement. As the sessions court judge had awarded costs of future surgery, as may be required to treat shortening of leg, it should be abated (see paras 27–28).

[Bahasa Malaysia summary

Ini adalah rayuan berhubung kuantum yang diawardkan dalam kes kemalangan jalan raya di mana perayu pertama sedang menaiki motosikal dengan perayu kedua sebagai pembonceng sepanjang Jalan Taman Mesra, Mak Mandin, Seberang Perai. Di simpang tiga jalan, responden yang memandu kereta tanpa berhenti di simpang itu, telah melanggar bahagian kanan motosikal. Semasa perbicaraan, ia telah dipersetujui oleh semua pihak bahawa liabiliti mesti dibahagikan pada nisbah 25% dan 75% masing-masingnya. Perayu pertama telah diawardkan ganti rugi am sejumlah RM36,000 dan ganti rugi khas sejumlah RM1,621 beserta faedah dan kos. Perayu kedua telah diawardkan ganti rugi sejumlah RM91,800, ganti rugi khas RM16,739, kos pembedahan masa hadapan sejumlah RM10,000 dan kesakitan dan kesengsaraan masa hadapan yang sewajarnya berjumlah RM5,000 beserta faedah dan kos. Cabaran perayu pertama berhubung kuantum adalah untuk kesakitan dan kesengsaraan dan kehilangan kemudahan akibat patah tulang yang tersimpul pada bahagian tengah femur kanannya dan embolisme lemak yang dihasilkan dan kehilangan pendapatan. Cabaran perayu kedua berhubung kuantum adalah di bawah kepala kesakitan dan kesengsaraan dan kehilangan kemudahan akibat patah tulang femur kanan dengan kependekkan 4 cm dan kehilangan prospek perkahwinan.

Diputuskan, membenarkan sebahagian rayuan:

(1) Walaupun embolisme lemak berpunca daripada tulang paha yang patah, ia kecederaan yang berbeza di mana perayu pertama kemungkinan mengalami secara serentak dan berturut-turut kesakitan dan kesengsaraan yang pada mulanya berasal daripada tulang patah dan embolisme dan kemudian kesakitan dan kesengsaraan daripada embolisme sahaja. Oleh itu, mahkamah telah mengawardkan satu award yang berasingan sejumlah RM15,000 untuk sindrom lemak embolisme dan RM30,000 untuk tulang paha yang patah. Perlu ada potongan 10% untuk penindihan award di bawah kepala ini. Bagi kehilangan pendapatan, tiada kesilapan yang boleh dirayu yang mewajarkan campur

tangan rayuan (lihat perenggan 21–23).

(2) Perayu kedua tidak memenuhi ujian 'good gracious' sepertimana dinyatakan dalam kes *Watson v Powles* [1967] 3 All ER 721 bagi tujuan mewajarkan campur tangan rayuan untuk award kepada RM50,000 bagi kesakitan dan kesengsaraan dan kehilangan kemudahan yang timbul daripada patah tulang paha kanan. Award oleh hakim mahkamah sesyen adalah dalam julat award-award terdahulu untuk kecederaan yang sama (lihat perenggan 24–25).

(3) Tuntutan untuk kehilangan prospek perkahwinan oleh perayu kedua adalah spekulatif. Perayu kedua hanya berumur 14 tahun pada masa kemalangan dan tiada bukti tentang cadangan perkahwinan yang telahpun dibuat kepadanya dan kesan tingkah laku daripada kemalangan jalan raya itu. Selanjutnya, dia tidak mengalami apa-apa kecacatan pada muka. Oleh kerana hakim mahkamah sesyen telah mengawardkan kos untuk pembedahan masa hadapan, sepertimana dikehendaki untuk merawat pemendekan kaki, ia perlu dikurangkan (lihat perenggan 27–28).]

Notes

For cases on road accident in general, see 6(2) *Mallal's Digest* (5th Ed, 2015) paras 2090–2093.

Cases referred to

Amera Farhana bt Rahmad & 3 Ors v Shah Rudin b Abd Rahman & 3 Ors [2011] 2 PIR [28] (refd)

Lee Eng Kiang (seorang budak yang mendakwa melalui ibu dan wakil litigasinya) v Kumareshannath a/l Dorasamy & Anor [2015] 1 PIR [61] (refd)

Mahmod bin Kailan v Goh Seng Choon & Anor [1976] 2 MLJ 239, FC (refd)

Mohd Zikri bin Sharulnizam v Thanesh a/l Murugiah [2015] 1 PIR [12] (refd)

Muhammad Amaluddin b Ikhwat v Teh Pig Joo [2014] 1 PIR [45] (refd)

Ng Kay Thong v Chan Shon Shong [1966] 2 MLJ 305, FC (refd)

Nithyananthan a/l Yasudaber v Samsul & Anor [2015] 1 PIR [8] (folld)

Noor Asfizatul Ain bt Jamaluddin v Vicent Lai [2015] 1 PIR [19] (refd)

Norhayati binti Mohd Hussain (bagi pihak dirinya sendiri dan sebagai balu yang sah, Esrin bin Robani, simati) & Anor v Rosli bin Makmor [2014] 1 PIR [9] (refd)

Pang Ah Chee v Chong Kwee Sang [1985] 1 MLJ 153, FC (refd)

Tan Chun Hiang v Pravindran Pillay a/l Nagaratnam & Anor [2014] 1 PIR [49] (refd)

Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22; [1985] CLJ Rep 323, SC (refd)

United Plywood and Sawmill Ltd v Lock Ngan Loi [1970] 2 MLJ 237, FC (refd)

Wong Khang Jong v Ali & Anor [1970] 1 MLJ 56, FC (refd)

Kuan Aun Wan (Ajmer Sandhu & Ong) for the appellants.
Habib Rahman bin Seeni Mohideen (Mohd Imtiaz Choong & Partners) for the respondent.

Lim Chong Fong JC:

INTRODUCTION

[1] This is an appeal brought by the appellants/plaintiffs against the respondent/defendant on the trial decision of the sessions court dated 29 January 2016 ('decision') on the quantum awarded only that arose from a road accident.

[2] The first appellant is the owner of the motorcycle bearing vehicle registration No PCT 381. The second appellant is related to the first appellant.

[3] The respondent is the owner of the motorcar bearing vehicle registration No PCD 9962.

[4] At the trial, it was agreed to by the parties that liability is apportioned between the appellants and the respondent at the ratio 25% and 75% respectively. The learned sessions court judge thereafter assessed the damages and awarded (100% basis) to the first appellant general damages of RM36,000 and special damages of RM1,621 with interests and costs and to the second appellant general damages of RM91,800, special damages of RM16,739, future costs of surgery of RM10,000 and accordingly future pain and suffering of RM5,000 together with interests and costs.

[5] The appellants were dissatisfied with the learned sessions court judge's award and have consequently filed their notice of appeal on 11 January 2016.

[6] After reading the appeal record and the written submissions filed by the parties, I heard counsel on 11 October 2016.

[7] I allowed the appeal to the extent that a further sum of RM15,000 is awarded to the first appellant for fat embolism syndrome subject to an overall discount of 10% after this further sum is added to the earlier awarded sum of RM30,000 (all on 100% basis). The respondent shall pay costs of this appeal of RM1,000 to the first appellant and there shall be no order as to costs of this appeal vis a vis the second appellant and the respondent.

[8] Accordingly, I furnish hereinbelow the grounds of my decision.

SALIENT FACTS

[9] On 28 August 2012 around 10.30pm, the first appellant was riding his motorcycle together with the second appellant as pillion rider along Jalan Taman Mesra, Mak Mandin, Seberang Perai. At the three way road junction, the respondent whilst driving his motorcar without halting at the junction collided onto the right side of the motorcycle.

[10] As the result of the collision, the appellants suffered personal injuries and were treated at the Hospital Seberang Jaya.

CONTENTIONS AND FINDINGS

[11] In this appeal as evident in the memorandum of appeal and subsequently the written submission of the appellant, the challenge on the quantum awarded by the learned sessions court judge was reduced to the several heads, viz:

The first appellant

(a) pain and suffering and loss of amenities due to closed comminuted fracture at the mid shaft of his right femur and resultant fat embolism; and

(b) loss of earnings.

The second appellant

(a) pain and suffering and loss of amenities due to right femur fracture with 4 cm shortening; and

(b) loss of marriage prospects.

[12] The law in respect of appeal against the quantum of damages awarded in negligence cases particularly motor vehicle road accidents is trite.

[13] In *Ng Kay Thong v Chan Shon Shong* [1966] 2 MLJ 305, Ong Hock Thye FJ (later CJ (Malaya)) held as follows at p 306:

> I do not think it serves any useful purpose here to discuss whether and to what extent this court is bound by its previous decision on the matter of quantum of damages, and whether the decision referred to accords with that of the Privy Council in *Jag Singh Toong Fong Omnibus Co Ltd* [1964] MLJ 463 which it purported to follow. Suffice it to say that the present appeal in my view concerns a case where the circumstances of the appellant are quite individualistic and exceptional. There was no loss of future earnings by reason of the incapacity: the artificial limb was not even shown to have been less than useful for all the calls that could be made on it. The appellant is not a housewife who often finds two good

hands indispensable simultaneously. In fact it was admitted that the appellant had since adapted himself. Permanent embarrassment, yes, besides a certain degree of handicap in the normal enjoyment of life. But beyond that I do not think that, over and above fair compensation, there should be any element of generosity for its own sake. As was stated in *Warren King* [1964] 1 WLR 1 'awards must be reasonable and assessed with moderation', what is fair 'should meet the plaintiff's requirements' and fair compensation should be 'fair as between the negligent person and his victim. Not punishment of him, but what he ought in fairness to pay'. ...

[14] Subsequently in *Wong Khang Jong v Ali & Anor* [1970] 1 MLJ 56, His Lordship further held as follows at p 57:

> The test which an appellate court has to apply in cases of appeal against quantum is that which Winn LJ has expressed in vivid and meaningful language: 'Good gracious me, is this clearly wrong?': see *Watson v Powles* [1967] 3 All ER 721 at p 723. In more prosaic terms: 'Is this a wholly erroneous estimate?' We have been referred by counsel on both sides to a number of awards in various courts, but, as the Privy Council judgment in *Jag Singh v Toong Fong Omnibus Co Ltd* [1964] MLJ 463 at p 465 emphasised:
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> > Caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in the main essentials the facts in one case bear comparison with the facts of another before any comparison between the awards in the respective cases can fairly or profitably be made.

[15] The 'good gracious' test has been emphasised by Gill FJ in *United Plywood and Sawmill Ltd v Lock Ngan Loi* [1970] 2 MLJ 237 as follows at p 238:

> As has been said again and again, the assessment of damages in cases of personal injury is one of the most difficult things for either a judge in the first instance or a Court of Appeal. When a man has lost his arm there is no sum in the world that can in the true sense compensate for it. Yet compensation in the form of money is the only way in which he can be granted redress for the injury he has suffered. It is neither possible nor desirable for damages for the loss of an arm to be standardised or rigidly classified, as no two cases are ever alike. But in order to maintain some semblance of uniformity, the amounts awarded in past cases, which bear reasonable comparison with the case under review, should serve as a useful guide. The general principle is that an appellate court can only interfere with an assessment if it is considered so inordinately low or inordinately high as to make the court exclaim, 'Good gracious, is that the sum which has been awarded — that sum must be altered', or if it is so much out of line with the discernible trend or pattern of awards in reasonably comparable cases that it must be regarded as a wholly erroneous estimate.

[16] Consequently upon appeal, the court would be hesitant and slow to disturb the quantum assessed by the trial court unless it is manifestly in error.

Thus in *Mahmod bin Kailan v Goh Seng Choon & Anor* [1976] 2 MLJ 239, Suffian LP held as follows at p 240:

> The principle upon which we can interfere with the award has been stated by Lord Wright in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 as follows:
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> Where the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer LJ in *Flint v Lovell*. In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

See also: *Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153 and *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22; [1985] CLJ Rep 323.

[17] Based on the aforesaid enunciated principles, I dealt with the challenges put forth by the appellants seriatim.

[18] The first head of challenge by the first appellant is primarily that the global award of RM30,000 awarded by the learned sessions court judge for the fracture of his femur as well as fat embolism syndrome is too low. The first appellant argued that the fat embolism syndrome should be separately awarded because it was significant here that resulted in the first appellant having to undergo intensive care treatment as disclosed in the medical report. As defined in Wikipedia, fat embolism is a 'type of embolism that is often caused by physical trauma such as fracture of bones, soft tissue trauma, and burns'.

[19] The first appellant relied on the case of *Amera Farhana bt Rahmad & 3 Ors v Shah Rudin b Abd Rahman & 3 Ors* [2011] 2 PIR [28] wherein the award of RM35,000 and RM30,000 were distinctly awarded for the femur fracture and saddle pulmonary embolism coupled with superficial vein thrombosis respectively. The learned sessions court judge however relied on the High Court case of *Muhammad Amaluddin b Ikhwat v Teh Pig Joo* [2014] 1 PIR [45] where a global award of RM30,000 was awarded for femur fracture and fat embolism syndrome on appeal.

[20] In *Mohd Zikri bin Sharulnizam v Thanesh a/l Murugiah* [2015] 1 PIR [12], I said the following in relation to global awards:

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11. The part that fell into error is the award of RM100,000.00 for severe head injury with residual disabilities. The learned judge relied on the case of *Seah Yit Chen v Singapore Bus Service (1978) Ltd & Ors* [1990] 3 MLJ 144 in making a single global award and he reproduced the relevant dicta in support which reads: '... when the injuries sustained are related to the same part or function of the body, there should only be one award of damages, without any risk of overlapping, where the injuries sustained are to different parts of the body and affect different function, as in the instant case where the plaintiff had sustained injuries to the knee and to the spine. It would be appropriate to make a separate award for each head of damage. In such cases, however, care would still have to be taken to avoid a further 'sub-itemizing' of a head of damage or injury'. Accordingly he went on to rely on the case of *Mohd Zuhairibin b Dahalan & 2 Ors v Razali b Abdul Rashid* [2013] 1 PIR [32] to assess the award by comparison.

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12. It is observed from the case of *Mohd Zuhairibin b Dahalan & 2 Ors* that the global award was given because of serious comminuted skull fracture and associated brain injury. The nature of the injuries therein can be plainly contrasted with the injuries here that were sustained on the scalp, face, jaw and eye of the Appellant. Although the injuries were all on the head region, they are to my mind different and distinct injuries ...

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[21] In this appeal, I am of the view that albeit the fat embolism emanated from the fractured femur, they are different and distinct injuries whereby the first appellant likely endured concurrent and consecutive pain and suffering initially from the fracture and embolism and later pain and suffering from the embolism only. Consequently, I think that the separate and fair award for this fat embolism syndrome is RM15,000. In this regard, my view is that RM30,000 for the fractured femur alone is fair following *Nithyananthan a/l Yasudaber v Samsul & Anor* [2015] 1 PIR [8]. However and as conceded by the first appellant, there should be a discount of 10% for overlapping on the overall award under this head, to wit: RM30,000 as earlier awarded + RM15,000 now added by me.

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[22] As for the head of challenge for loss of earnings by the first appellant, it boils down to sufficiency of proof. This has been made clear by the learned sessions court judge in his grounds of judgment as follows:

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Bagi item (K) untuk kehilangan pendapatan Mahkamah menolak tuntutan ini kerana ianya tidak dibuktikan. Plaintif mendakwa bekerja sebagai kelindan lori semasa kemalangan tetapi dia sendiri tak tahu nama taukenya. Baucher yang dikemukakan hanyalah ditandakan ID11A dan 11B. Tambahan lagi majikan tidak dipanggil memberikan keterangan untuk menyokong keterangan Plaintif ini.

I

[23] The burden of proof plainly lies with the first appellant and I do not see any appealable error here that warranted appellate intervention.

[24] As for the second appellant, the first head of challenge is the

insufficiency of the award of RM50,000 for pain and suffering and loss of amenity arising from the fracture to the right femur with 4 cm shortening. The second appellant claimed for RM60,000.

[25] Upon review of the trend of award for the past decided cases such as *Noor Asfizatul Ain bt Jamaluddin v Vicent Lai* [2015] 1 PIR [19], *Norhayati binti Mohd Hussain (bagi pihak dirinya sendiri dan sebagai balu yang sah, Esrin bin Robani, simati) & Anor v Rosli bin Makmor* [2014] 1 PIR [9] and *Tan Chun Hiang v Pravindran Pillay a/l Nagaratnam & Anor* [2014] 1 PIR [49], I am not satisfied that the second appellant met the 'good gracious' test to justify appellate intervention here. The award of the learned sessions court judge is within the range of past awards for similar injuries.

[26] Lastly as for the head of challenge by the second respondent for the loss of prospect of marriage, the learned sessions court judge disallowed it for the following reason in his grounds of judgment:

> Peguam Plaintif berhujah untuk jumlah RM20,000.00. Mahkamah menolaknya kerana ianya belum dapat dipastikan.

[27] The second appellant was only 14 years of age at the time of the accident. There is no proof of a marriage proposal that was already made to her and withdrawn consequent to the road accident. The claim is thus speculative. In *Lee Eng Kiang (seorang budak yang mendakwa melalui ibu dan wakil litigasinya) v Kumareshannath a/l Dorasamy & Anor* [2015] 1 PIR [61], Nordin Hassan JC held as follows:

> [38] HMS tidak memberi apa-apa award berkaitan perkara ini adalah dipersetujui. Tiada apa-apa asas untuk menunjukkan plaintif mempunyai prospek yang berkurangan untuk berkahwin. *Kes Saniah & Ors v Abdul Hamid & Ors* [1967] 1 LNS 156 yang dirujuk oleh peguam plaintif boleh dibezakan. Dalam kes tersebut mangsa adalah seorang wanita yang telah cacat paras wajahnya dan diputuskan ini mengurangkan prospek mangsa untuk berkahwin. Perkara ini tidak seperti dalam kes plaintiff. Oleh itu tiada award untuk item ini diberikan.

[28] Likewise the second appellant here did not suffer any facial disfigurement. Her only setback is the 4 cm shortening of her right leg. That notwithstanding, Mr Tan Boon Hoo, consultant orthopedic surgeon at the Hospital Lam Wah Ee who treated her opined as follows in his medical report dated 7 October 2014:

> In view of the above clinical history, findings as well as the radiological evidence, this patient's main incapacity is located over the non-union of her right femur. This has given rise to severe shortening as well as unable to walk with full weight bearing. However, non-union of any fracture is a treatable orthopedic condition. The treatment would be that of internal fixation or external fixation with bone grafting

> operation. As this patient has a past history of infection before, I would strongly recommend some form of external fixation of the fracture right femur with bone grafting. If the treatment is successful, then the patient should be able to walk with full weight bearing. However some shortening will remains but it would not be as severe as 4 cm ...

The learned sessions court judge has awarded costs of future surgery to the second appellant and the leg shortening should then be abated.

[29] In the circumstances, I am of the view that the learned sessions court has correctly denied the second appellant this particular head of her claim.

CONCLUSION

[30] It is for the foregoing reasons that I have partially allowed the appeal as so ordered.

Appeal partially allowed.

Reported by Nisha Paran